



# Memorandum

U.S. Department  
of Transportation

**Federal Highway Administration  
Federal Transit Administration**

**SENT BY ELECTRONIC MAIL**

Subject: **INFORMATION:** Revised Guidance for Implementing  
the March 1999 Circuit Court Decision Affecting  
Transportation Conformity

Date: January 2, 2002

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Reply to: HEPN-10

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To: FHWA Division Administrators  
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On March 2, 1999, the United States Court of Appeals for the District of Columbia Circuit issued a decision on EPA's August 1997 transportation conformity amendments in response to a case brought by the Environmental Defense Fund. The EPA will be providing revised conformity regulations that implement this ruling in the near future. This memorandum supersedes and replaces all previous FHWA and FTA guidance implementing this ruling, including the Additional Supplemental Guidance issued on June 18, 1999. The FHWA and FTA consulted with EPA on the development of this guidance. This guidance does not supersede any existing settlement agreements that address this subject. In addition, guidance on other issues addressed by the March 1999 court decision can be found in EPA's "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision," published on May 14, 1999 (<http://www.epa.gov/otaq/transp/conform/epaguidf.pdf>).

## Projects That Can Proceed During a Conformity Lapse:

The court decision held that projects that had previously been found to conform and had completed the National Environmental Policy Act (NEPA) process ("grandfathered" projects) may not be advanced (that is, such projects should not be approved) in nonattainment and maintenance areas which do not have a currently conforming transportation plan and transportation improvement program (TIP). Thus, in such areas, no new approvals or grants for further development of projects (i.e., NEPA, final design, right-of-way acquisition, or construction) should be made. The only projects which can receive further approvals or grants during a plan and TIP conformity lapse are: (1) projects exempt from the conformity process; and (2) transportation control measures (TCMs) which are included in an approved State implementation plan (SIP).

A non-exempt project is any project that is not listed as exempt in the transportation conformity rule at 40 CFR 93.126 or 93.127, or the project is not a TCM in an approved SIP.

For FHWA-funded projects, project phases (i.e., design, right-of-way acquisition, or construction) that received funding commitments or an equivalent approval or authorization prior to a conformity lapse may continue during the lapse. The execution of a project agreement (which includes Federal approval of the plans, specifications, and estimates) indicates funding commitment.

For FTA, the largest projects are handled with a full funding grant agreement (FFGA). If the FFGA was executed prior to a conformity lapse, the project can continue to utilize Federal funding during the lapse. If the FFGA was not completed by the date of the lapse, the project sponsor may only complete the current stage of project development (e.g., final design or land acquisition), but may not use Federal funds to proceed further. Transit projects not handled with FFGAs may proceed during a lapse if, prior to the lapse, FTA approved a grant and the project sponsor awarded a contract for construction or vehicle acquisition. If a local contract was not approved by the date of the lapse, the project sponsor may only complete the current stage of project development with Federal funds.

Subsequent phases of a project for which FHWA or FTA has not taken an approval action or awarded a grant may not proceed in the absence of conformity. For transportation project phases not requiring a project specific project agreement/authorization approval, the State or local transportation agency should not take any action committing the State or local agency to proceed with the project phase during a lapse unless the project phase had already received full approval or authorization for funding before the lapse.

Preliminary engineering for project development activities that are necessary to assess social, economic, and environmental effects of the proposed action or alternatives as part of the NEPA process for a non-exempt project may continue during the lapse, according to 40 CFR 93.126. However, FHWA or FTA cannot approve a categorical exclusion, finding of no significant impact, final environmental impact statement, or a record of decision for a non-exempt project during a conformity lapse. The NEPA process can be completed for exempt projects and TCMs in an approved SIP during a conformity lapse.

When a community is facing a conformity lapse within 6 months, FHWA, FTA, and EPA will meet and jointly evaluate the potential consequences of the lapse and assess any concerns. The FHWA, FTA, and EPA will meet at least 90 days before a conformity lapse to determine which projects could receive funding commitments before the lapse, and which projects could potentially be delayed, and the actions that would be necessary to correct the lapse. In preparation for these discussions, FHWA and FTA offices, in consultation with project sponsors, should review the current TIP to identify the current status of development of non-exempt projects being advanced in the nonattainment or maintenance area. As you know, some nonattainment areas include more than one metropolitan planning organization (MPO).

When a conformity lapse is imminent, FHWA Division Administrators and FTA Regional Administrators shall notify the Governor or the Governor's designee immediately to inform him/her of the consequences, and potential solutions to minimize disruptions to the transportation programs in the respective nonattainment and maintenance areas. The FHWA and FTA will consult with EPA regional offices before notifying the Governor or the Governor's designee of conformity consequences and solutions.

Coordination between FHWA, FTA and EPA prior to a conformity lapse is detailed in the April 19, 2000, National Memorandum of Understanding (MOU) Between the U.S. DOT and the U.S. EPA (<http://www.fhwa.dot.gov/environment/cnfmou.htm>). Appendix A of the MOU also discusses how to meet the transportation planning requirements during a lapse in order to continue funding exempt projects and TCMs until conformity is reestablished. Therefore, in the event of a conformity lapse, an MPO must create an interim plan and TIP for any projects that can be federally-funded and approved during the lapse, including exempt projects and TCMs in an approved SIP. Please see the MOU for more information regarding the requirements for including projects in an interim plan and TIP.

Other Issues:

To address other issues related to the Court ruling, on May 14, 1999, EPA issued "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision" which provides more details about using submitted budgets, projects requiring Federal approval, non-Federal projects, SIP disapprovals, and reallocation of a SIPs safety margin. Areas should reference this guidance for specific information on these other issues. The EPA, in coordination with DOT, will be working to formalize the guidance through the rulemaking process to amend the conformity regulation.

If you have questions on this guidance, please contact Ms. Cecilia Ho (202) 366-9862 or Mr. Gary Jensen (202) 366-2048 of FHWA, or Mr. Abbe Marner (202) 366-4317 of FTA.

cc: Directors of Field Services